IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-596

SAMUEL GENE PEACH,

Petitioner,

vs.

GOVERNMENT OF THE CANAL ZONE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AUTHORITIES CITED

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Petitioner, Samuel Gene Peach, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction in the United States District Court for the District of the Canal Zone in violation of Chapter 6, Canal Zone Code for the charge of murder in the first degree.

REFERENCE TO REPORTS OF OPINIONS

Government of the Canal Zone v. Samuel Gene Peach, 602 F.2d 101 (Gen. No. 78-5414), is attached as Appendix "A".

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 10, 1979. No petition for rehearing was filed. Jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the accused in a capital case, to whom proper Miranda warnings have been given, necessarily (per se) waives and relinquishes his constitutional right to counsel merely by failing to make an unequivocal demand for the assistance of counsel before incriminating himself.

II.

Whether the defendant's request for assigned counsel is indispensably necessary to trigger the operation of Rule 44 of the Federal Rules of Criminal Procedure; and, if not, whether the violation of such Rule precludes the admission of resultant incriminating statements by the accused.

CONSTITUTIONAL PROVISIONS PRESENTED

The self-incrimination provisions of the Fifth Amendment to the Constitution of the United States.

The Right to Counsel Clause of the Sixth Amendment to the Constitution of the United States.

The Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

RULES INVOLVED

Rule 5, Federal Rules of Criminal Procedure.

INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) In general. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without necessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C., Sec. 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4 (a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor offenses. If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U.S.C. Sec. 3041, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(c) Offenses not triable by the United States magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances

under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

Rule 44. *ASSIGNMENT OF COUNSEL*

(a) Right to assigned counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every state of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

(b) Assignment procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

STATEMENT OF FACTS

Samuel Gene Peach was charged in the United States District Court for the District of the Canal Zone in a single count information with the offense of murder in the first degree in violation of Chapter 6, Canal Zone Code, Sec. 1183 (a).

During the early evening hours of December 29, 1977, Bertha Rubiella (Ruby) Gutierrez, a 21-year-old Panamanian maid, was brutally beaten and stabbed to death in the Canal Zone residence of her employer, Gary Anderson. The Andersons were all away from home at the time. Anderson discovered the body when he returned to his house at 8:45 P.M. He called the Canal Zone police; the police pathologist determined the time of death to be approximately 7:00 P.M.

The police soon commenced interviewing friends and acquaintances of the Anderson family and of the deceased in an effort to develop leads. One of the more than 40 persons interviewed was the Appellant, Peach, a 19-year-old soldier stationed at Fort Kobbe, Canal Zone, who had dated Anderson's 14-year-old daughter, Carrie. Peach was first interviewed on January 5, 1978, when he responded to a request to come to the Balboa police station for questioning. Detectives Don Rudy and Mel Attkinson conducted the interview, during which Peach affirmed that he knew Carrie Anderson and admitted having sexual intercourse with her on one occasion a few months earlier. When asked to account for his activities on December 29, Peach said that he had gone to the Anderson residence at about 6:30 P.M. on that day, but, upon being told by the maid that Carrie was not there, he had left.

Up to this point, Peach had not been given the warnings set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), but he had been told that he did not have to answer any questions, and, by his own admission, felt free to leave the stationhouse at any time. At the close of this first phase of the interview, he was read his rights, and, since he indicated that he did not totally understand them, they were explained to him in detail. He then said that he understood them; he gave no indication that he wished to consult an attorney.

The questioning resumed briefly prior to a break for lunch and continued afterwards for a short time until Peach asked to see a chaplain. One of the detectives drove him back to his barracks, and Peach agreed to be available for questioning the next day. After his return to the barracks, Peach went to see a friend, PFC Donald Jeeninga. Peach confessed to Jeeninga that he had raped the maid who worked for the parents of his girlfriend and had then killed her because she would recognize him if he ever returned to the Anderson home. Peach gave Jeeninga some clothing and asked him to dispose of it.

Peach next went to see a very close friend, Sgt. Robert Perry, at his home and asked to talk with him privately. Peach again confessed to the murder. Perry urged Peach to turn himself in and said that if Peach did not do so by the following Monday, January 9, Perry would report their conversation. Peach said, "Okay." Record, vol. 5, at 132.

The next day, the detectives came to the barracks and asked Peach if he would return to the stationhouse for further questioning. Peach declined but said he would answer questions there on the base. He was asked if he

recalled his rights as they had been explained the day before, and he said he did. He was questioned about the clothes he was wearing on December 29. He consented to a search of his room, during which the police seized some of his clothing. While at the barracks, the detectives met an Army Criminal Investigation Command Agent, Anthony Japuntich. The police asked Japuntich's aid in obtaining photographs and fingerprints of Peach since they were afraid he might flee. Japuntich cleared this request with Peach's commanding officer, and the group went to the agent's headquarters at Albrook Air Station where Peach was photographed and fingerprinted. While alone with Japuntich in the latter's office, Peach asked if he was entitled to an army lawyer. Japuntich called the army legal office and was told that if Peach were arrested by the civilian authorities, the Army probably would not represent him, but Japuntich was given the names of some military lawyers to contact directly. Japuntich attempted, unsuccessfully, to call them, after which he gave the list of names and phone numbers to Peach.

Peach and Japuntich then left the office and walked to the waiting room where they rejoined the detectives. Japuntich stated that he believed he had advised the police officers that Peach wanted to know if he was authorized to have a military lawyer and that he had given him some telephone numbers. The detectives had been in touch with their superior in the interim, and, soon after Peach walked into the room, they arrested him for the statutory rape of Carrie Anderson. They advised Peach of his rights, then took him to the Canal Zone jail where he was booked, again given full Miranda warnings, and placed in a cell.

The next day, Saturday, January 7, Peach was brought before the Balboa Magistrate for his initial appearance pursuant to Fed. R. Crim. P. 5. There is no transcript of this hearing, but the testimony at the suppression hearing and the magistrate's brief report of proceedings indicate the following sequence of events. Peach appeared in person, unrepresented by counsel. The statutory rape complaint was read to him, and Peach was informed of his rights, including the right to retain counsel of his choice or to have an attorney appointed for him if he could not afford one. Peach stated he understood the charge against him and his rights as they had been explained. There followed a colloquy between Peach and the magistrate regarding Peach's financial ability to employ an attorney. The magistrate was evidently of the opinion that since Peach was employed by the Army he was not indigent and did not need appointed counsel. Acting on instructions from the magistrate, Detective Attkinson obtained a list of Canal Zone attorneys for Peach to contact, and this list was given to Peach at the hearing.

Peach was returned to his cell and the officer on duty was instructed that Peach could call his family, friends or an attorney, but Peach made no attempt to contact anyone. There was a dispute in the testimony regarding whether a phone was placed in Peach's cell at the jail. There was no dispute of the fact that he never used said phone. The officer in charge of the jail was advised by one of the detectives that Peach could call his lawyer, a judge advocate officer or the unit commander. The jail officer, however, never personally imparted that information to Peach. About two hours after the hearing, Detective Attkinson came to Peach's cell and asked him if he had retained an attorney. Peach said no.

The officer who subsequently took the statement from Peach two hours after his appearance before the magistrate, indicated that in his mind, at the time of the 5(a) hearing there was no question that Peach wanted or was thinking in terms of consulting a lawyer. After an hour of questioning, Peach requested to be able to contact his friend, Sgt. Perry and used the phone for that purpose, but could not reach him. He was returned to his cell and one of the police officers advised him that they would have Sgt. Perry come to the police station.

Perry came to the police station and talked with Peach alone for about fifteen minutes. The two men may have discussed the possibility of obtaining a lawyer for Peach, but the court found that this discussion, if it occurred, was never communicated to the police. Two detectives then reentered the room, and, in Perry's presence again read the Miranda warnings. Peach then gave a disjointed oral statement of his activities on December 29, 1977, including the killing of Ruby Gutierrez. Following this statement, he agreed to go with the police to the Anderson home to reenact the crime. He also took the police to the place where he had thrown the murder weapon into the canal. Perry was not permitted to come along on this trip. After returning to the police station, Peach dictated a confession to a police stenographer, read the typed statement twice, and signed it. The confession states in the first paragraph, "I understand my rights. I do not want a lawyer present at this time." Government Exh. 18.

Peach had his initial appearance before the magistrate on the murder charge the next day, January 8. He did not request an attorney and none was appointed for

him. At the continuation of this hearing on January 12, 1978, the public defender was appointed to represent Peach at the request of the United States Attorney when Peach said he was unable to retain his own counsel because he was paying off outstanding bills.

An information was filed against Peach on February 3, 1978. Following a jury trial, he was found guilty and sentenced to life imprisonment.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED.

Petitioner, Peach's murder conviction must be reversed because it impermissibly significantly rests on certain incriminating oral statements and a damaging typed formal statement of the defendant obtained on January 7, 1978, by the Canal Zone police in violation of the defendant's right to counsel as guaranteed by the Sixth Amendment and Rule 44 of the Federal Rules of Criminal Procedure. Defendant Peach had no lawyer or private legal advice of any kind from January 5, 1978, when his murder interrogation by the police began, until long after his above-noted challenged incriminating statements of January 7. Despite the fact that Peach made separate previous appearances before the same Federal Magistrate under Federal Criminal Procedure Rules 5 and 44—one on a related statutory rape charge on January 7, and the other on the within capital charge on January 8—Peach never got a lawyer until his third appearance on January 12, when the Public Defender (though not in the courtroom) was finally at least appointed to defend him on the murder charge at the personal insistence and urging of the United States Attorney. By this time, of course, the proverbial cat was long out of the bag. Defendant's last incriminating admission to the police came on January 11, less than twenty-four hours before the Public Defender was finally grudgingly appointed by the Magistrate.

Moreover, the Canal Zone homicide detectives apparently arrested Peach on the related statutory rape

charge wholly or chiefly in order to more effectively grill him concerning his involvement in the present murder. The Federal Magistrate more than obliged by fixing the statutory rape bail $5,000.00 beyond Peach's financial means, failing and/or refusing to appoint counsel for Peach, and by remanding him to the custody of the very detectives who strongly suspected him of having committed the present related murder. As an apparent part of their efforts, the officers—three of whom were actually present in the Magistrate's courtroom—wholly failed to inform or even hint to the Magistrate on January 7, that the defendant was then the prime and only suspect in the present related murder and that they had in fact been intermittently questioning him since 11:30 A.M. on January 5. As it finally develops, the vast bulk of the defendant's challenged incriminating statements were made to the police in direct response to their incommunicado questioning of the lawyerless Peach at the jail within hours of his first appearance before the Magistrate on the afternoon of January 7.

Peach's constitutional right to counsel having clearly attached under *Massiah* and *Brewer* no later than the time of his first Rule 5 appearance before the Magistrate on the statutory rape charge—formal proceedings having been initiated by a formal statutory rape complaint—the dispositive constitutional issue becomes whether or not the accused effectively waived and relinquished such right before incrimination himself. The Government's case that he did rests wholly or principally on the proposition that the simple giving of several sets of *Miranda* warnings by the police, and one set by the Magistrate, coupled with the accused's failure to affirmatively state that he wanted a lawyer, was the functional legal equivalent of the constitutionally required "effective assistance of counsel" and "cured"

whatever constitutional improprieties might otherwise have been involved.

This is untenable. *Miranda* warnings are not the functional legal or other equivalent of the accused's own lawyer and no more "cleanse" the deprivation of the accused's right to counsel on this Record than the giving of similar warnings in *Brown v. Illinois*, 422 U.S. 590 (1975), "cured" the admission of a murder confession in that case obtained by reason of an unconstitutional arrest. The mere making of incriminating statements in response to *Miranda* warnings has never been held to constitute a constitutionally effective waiver of the right to counsel. See, e.g., *North Carolina v. Butler*, 99 S. Ct. 1755, 1757 (1979) and authorities there cited.

The Judgment of the Court of Appeals for the Fifth Circuit affirming petitioner's murder conviction by use of *per se* rules that require an accused, in order to obtain counsel, to affirmatively state that he is indigent and desires counsel appointed for him is unsupportable for the following reasons:

(a) Said Judgment and Opinion fly squarely in the face of this Court's rulings in *Brown v. Illinois*, 422 U.S. 590 (1975) and *North Carolina v. Butler*, 99 S. Ct. 1755 (1979) which expressly reject the application of *per se* rules in relation to "waiver" of a custodial accused's Right to Counsel.

(b) Said Judgment and Opinion wholly ignore petitioner's contention, based chiefly on *City of Chicago v. Mayer*, 404 U.S. 189, 92 S. Ct. 410 (1971), that his Due Process right to a verbatim transcript of his 5(a) hearing, wherein he was held to have waived counsel, was not available.

(c) Said Judgment and Opinion also ignore petitioner's contention that the Magistrate's ruling that petitioner was not entitled to counsel because he was in the Army and so was not "indigent" deprived him of Due Process and Equal Protection of the Laws. Thus it is clear that counsel would have been assigned to him on the occasion of his January 7, 1978 Rule 5(a) arraignment had he been a pauper.

(d) The Fifth Circuit Opinion also wholly fails to respond to petitioner's contention that the Federal Magistrate's ruling that he was only entitled to counsel if he could presently afford it nullified and cancelled out all of the *Miranda*-based advice to the contrary made by the police and by the Magistrate himself. Petitioner saw that the Magistrate refused to assign him counsel. Certainly that action would, in petitioner's eyes, take precedence over what the police told him were his rights.

(e) The Court of Appeals' Decision likewise ignores the point that Rule 44 and the Sixth Amendment plainly assume that counsel will be provided for the "presently indigent" at a Rule 5(a) hearing absent a showing of express waiver of counsel on the Record. The Record should show such a waiver and it does not. Of course, a 5(a) hearing is a "critical stage" of any federal criminal proceeding.

(f) Portions of the Court of Appeals' Opinion are not supported by the existing Record and/or are self-contradictory, particularly in relation to the discussion of Rule 44. See, e.g., footnote 1, p. 7414 and *De La Fe v. United States*, 413 F. 2d 543, 544 (5th Cir. 1969), relied upon as a Rule 44 case, but which had nothing to do with Rule 44.

II.

RULE 44 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WAS VIOLATED AND REQUIRES AUTHORITATIVE CONSTRUCTION BY THIS COURT. THE COURT HAS NEVER CONSTRUED RULE 44 IN RELATION TO CONFESSION-ADMISSIBILITY PROBLEMS.

We now turn to the unhappy spectacle of Peach's first uncounselled appearance before the Federal Magistrate at 1:40 P.M. on Saturday, January 7, 1978. This episode, properly though for the wrong reasons, characterized by the distinguished trial judge and the Court of Appeals as a "crucial incident" in the scenario of Peach's right to counsel problems, emerges only in rough outline since the Canal Zone "[u]nfortunately . . . does not require that proceedings before its [federal] magistrates be recorded." (R. Vol. 1, 173). What this Court has held to be constitutionally mandated in the trial of a simple ordinance violation involving no risk of jail, *City of Chicago v. Mayer*, 404 U.S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971), is not in the Canal Zone even required in felony, including capital, cases brought before magistrates where long-time loss of liberty and even life itself may hang in the balance. This is itself a denial of due process and equal protection to petitioner.

The Federal Magistrate's duty under Rule 44 of the Federal Rules of Criminal Procedure was very clear. Such Rule provides:

> "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment."

As noted by Professor Wright, *Fed. Prac. & Proc.*, Vol. 3, Sec. 731, page 210:

> "In 1966 Rule 44 was rewritten . . . and subdivision (a) of the amended rules states very broadly the right of a defendant unable to *obtain* counsel to have counsel assigned to represent him at every stage of the proceedings. . . . In this respect, Rule 44 is broader than the Criminal Justice Act, because the statute is cast in terms of financial inability while the Rule applies to 'every defendant who is unable to obtain counsel.'" (emphasis added)

Thus, when it appeared to the Magistrate that Peach was without counsel and was obviously in no position to obtain counsel, counsel should clearly have been assigned under Rule 44, entirely apart from the Sixth Amendment. Instead, the stylized record of the January 7 proceeding leaves no doubt that counsel was not assigned because of the Magistrate's belief that Peach could somehow hire his own attorney. This, of course, flies directly in the face of the above-mentioned Amendment of 1966, which was expressly designed to ensure assigned counsel for any accused *unable for any reason*, financial or otherwise, to secure counsel. As stated in *United States v. Barber*, 291 F. Supp. 38, 41-42 (Dist. of Neb. 1968):

> "In the present case, the Commissioner was making his 'appropriate inquiry' as to whether or not counsel should be appointed. It is conceded that defendant did not waive her right to counsel before the Commissioner. The question thus becomes whether or not the defendant can, such as in the present situation, waive the right to counsel to the law enforcement authorities while the Commissioner is making his 'appropriate inquiry.' Defendant, appropriately, notes in her brief that there are no sanctions available for a violation of

this statute. She points out that to allow the police to cajole, persuade, etc., the defendant to waive her right to counsel in the instance where there is a delay in the appointment of counsel would run contrary to the spirit of Sec. 3006A (b) as well as Rule 44 of the Fed. R. Crim. P., 18 U.S.C.A. See 4 Federal Practice & Procedure, Barron-Holtzoff, Sec. 2461, 1967 Pocket-part, 200. This Court agrees. The act obviously seeks to assure that everyone, rich or poor, will have the opportunity to utilize the services of an attorney as early in the proceedings as is possible. Congress must certainly have been well aware of the fact that any good attorney will advise his client to say nothing, for it has been stated often enough by the judicial branch of the government. With this in mind, and with the intention of Congress to insure an early appointment, it is difficult to arrive at the conclusion that having been before a Commissioner and expressed a desire to obtain counsel, as is the case here, either by retention or appointment, a defendant can waive the right to counsel to the police during the delay in determining whether or not one should be appointed."

Also see, *United States v. Cookston*, 379 F. Supp. 487 (D. Texas, 1974) (incriminating statements made by accused to police 5 hours after his 5(a) appearance before a magistrate excluded under Rule 44); and *United States ex rel. Dailey v. Yeager*, 415 F. 2d 779 (3rd Cir. 1969).

CONCLUSION

From the above and foregoing premise, petitioner prays that your Honors will consider his complaints to be of sufficient constitutional magnitude to warrant this Court's review on writ of certiorari.

Respectfully submitted,

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APPENDIX "A"

Opinion of the United States Court of Appeals for the Fifth Circuit

GOVERNMENT OF THE CANAL ZONE,
Plaintiff-Appellee,

v.

SAMUEL GENE PEACH,
Defendant-Appellant.

No. 78-5414.

United States Court of Appeals,
Fifth Circuit.

Sept. 10, 1979.

Defendant was convicted in the United States District Court for the District of Balboa in the Canal Zone, Lansing L. Mitchell, J., of murder. Defendant appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) record demonstrated that defendant waived right to assistance of counsel, and (2) in view of record showing that defendant had been advised for fifth time of his right to retain counsel or to have attorney appointed to represent him if he could not afford to obtain one himself, and where magistrate conducted inquiry regarding whether defendant could afford lawyer, at first hearing before magistrate, and defendant failed to give any indication to magistrate that defendant could not afford attorney or that he wanted one appointed, rule did not require that anything more be done; it was incumbent on defendant to give some indication that he wanted attorney appointed for him.

Affirmed.

1. Criminal Law—232

Accused had right to assistance of counsel beginning at least with his first appearance before magistrate. U.S.C.A. Const. Amend. 6; Fed.Rules Crim.Proc. rules 5, 44, 44(a), 44 note, 18 U.S.C.A.

2. Criminal Law—641.4(4)

Record on appeal from conviction demonstrated that defendant waived right to assistance of counsel. U.S.C.A. Const. Amend. 6; Fed.Rules Crim.Proc. rules 44, 44(a), 44 note, 18 U.S.C.A.

3. Criminal Law—232

In view of record showing that defendant had been advised for fifth time of his right to retain counsel or to have attorney appointed to represent him if he could not afford to obtain one himself, and where magistrate conducted inquiry regarding whether defendant could afford lawyer, at first hearing before magistrate, and defendant failed to give any indication to magistrate that defendant could not afford attorney or that he wanted one appointed, rule did not require that anything more be done; it was incumbent on defendant to give some indication that he wanted attorney appointed for him. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rules 5, 44, 44(a), 44 note, 18 U.S.C.A.

Appeal from the United States District Court for the District of The Canal Zone.

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

TJOFLAT, Circuit Judge:

Samuel Gene Peach appeals his conviction for the first degree murder of Ruby Gutierrez. He contends that a confession introduced at trial was obtained from him in violation of his right to counsel under the sixth amendment and rule 44 of the Federal Rules of Criminal Procedure. Finding no reversible error in the proceedings below, we affirm the conviction.

I

During the early evening hours of December 29, 1977, Bertha Rubiella (Ruby) Gutierrez, a 21-year-old Panamanian maid, was brutally beaten and stabbed to death in the Canal Zone residence of her employer, Gary Anderson. The Andersons were all away from home at the time. Anderson discovered the body when he returned to his house at 8:45 p. m. He called the Canal Zone police; the police pathologist determined the time of death to be approximately 7:00 p. m.

The police soon commenced interviewing friends and acquaintances of the Anderson family and of the deceased in an effort to develop leads. One of the more than 40 persons interviewed was the appellant, Peach, a 19-year-old soldier stationed at Fort Kobbe, Canal Zone, who had dated Anderson's 14-year-old daughter, Carrie. Peach was first interviewed on January 5, 1978, when he responded to a request to come to the Balboa police station for questioning. Detectives Don Ruby and Mel Attkinson conducted the interview, during which Peach affirmed that he knew Carrie Anderson and admitted having sexual intercourse with her on one occasion six months earlier. When asked to account for his activities on December 29, Peach said that he had gone to the Anderson residence at about 6:30 p. m. on that day, but, upon being told by the maid that Carrie was not there, he had left.

Up to this point, Peach had not been given the warnings set forth in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), but he had been told that he did not have to answer any questions, and, by his own admission, felt free to leave the stationhouse at any time. At the close of this first phase of the interview, he was read his rights, and, since he indicated that he did not totally understand them, they were explained to him in detail. He then said that he understood them; he gave no indication that he wished to consult an attorney.

The questioning resumed briefly prior to a break for lunch and continued afterwards for a short time until Peach

asked to see a chaplain. One of the detectives drove him back to his barracks, and Peach agreed to be available for questioning the next day. After his return to the barracks, Peach went to see a friend, PFC Donald Jeeninga. Peach confessed to Jeeninga that he had raped the maid who worked for the parents of his girlfriend and had then killed her because she would recognize him if he ever returned to the Anderson home. Peach gave Jeeninga some clothing and asked him to dispose of it.

Peach next went to see a very close friend, Sgt. Robert Perry, at his home and asked to talk with him privately. Peach again confessed to the murder. Perry urged Peach to turn himself in and said that if Peach did not do so by the following Monday, January 9, Perry would report their conversation. Peach said, "Okay." Record, vol. 5, at 132.

The next day, the detectives came to the barracks and asked Peach if he would return to the stationhouse for further questioning. Peach declined but said he would answer questions there on the base. He was asked if he recalled his rights as they had been explained the day before, and he said he did. He was questioned about the clothes he was wearing on December 29. He consented to a search of his room, during which the police seized some of his clothing. While at the barracks, the detectives met an Army Criminal Investigation Command Agent, Anthony Japuntich. The police asked Japuntich's aid in obtaining photographs and fingerprints of Peach since they were afraid he might flee. Japuntich cleared this request with Peach's commanding officer, and the group went to the agent's headquarters at Albrook Air Station where Peach was photographed and fingerprinted. While alone with Japuntich in the latter's office, Peach asked if he was entitled to an army lawyer. Japuntich called the army legal office and was told that if Peach were arrested by the civilian authorities, the army probably would not represent him, but Japuntich was given the names of some military lawyers to contact directly. Japuntich attempted, unsuccessfully, to call them, after which he gave the list of names and phone numbers to Peach.

Peach and Japuntich then left the office and walked to the waiting room where they rejoined the detectives. Japuntich could not recall whether he told the police officers about his conversation with Peach, but he testified that Peach had never asked for a lawyer and Japuntich did not tell the detectives that he had. The detectives had been in touch with their superior in the interim, and, soon after Peach walked into the room, they arrested him for the statutory rape of Carrie Anderson. They advised Peach of his rights, then took him to the Canal Zone jail where he was booked, again given full *Miranda* warnings, and placed in a cell. A phone was available for his use, but Peach made no attempt to contact either a military or civilian lawyer.

The next day, Saturday, January 7, Peach was brought before the Balboa magistrate for his initial appearance pursuant to Fed.R.Crim.P. 5. There is no transcript of this hearing, but the testimony at the suppression hearing and the magistrate's brief report of proceedings indicate the following sequence of events. Peach appeared in person, unrepresented by counsel. The statutory rape complaint was read to him, and Peach was informed of his rights, including the right to retain counsel of his choice or to have an attorney appointed for him if he could not afford one. Peach stated he understood the charge against him and his rights as they had been explained. There followed a colloquy between Peach and the magistrate regarding Peach's financial ability to employ an attorney. The magistrate was evidently of the opinion that since Peach was employed by the Army he was not indigent and did not need appointed counsel. Peach said nothing to counteract this impression, and one witness testified that Peach indicated he would take care of obtaining counsel. Acting on instructions from the magistrate, Detective Attkinson obtained a list of Canal Zone attorneys for Peach to contact, and this list was given to Peach at the hearing. At no time did Peach request or indicate to the magistrate that he wanted an attorney appointed.

Peach was returned to his cell and the officer on duty was instructed that Peach could call his family, friends, or

an attorney, but Peach made no attempt to contact anyone. About two hours after the hearing, Detective Attkinson came to Peach's cell and asked him if he had retained an attorney. Peach said no. He was then escorted to an interrogation room where he agreed to answer questions after hearing his rights read to him again. After about 40 minutes of questioning about the statutory rape and his whereabouts on the day of the murder, Peach said he would tell the police what they wanted to know but first he wanted to talk to his friend Sgt. Perry.

Perry came to the police station and talked with Peach alone for about fifteen minutes. During this discussion Peach said he was ready to come clean with the police. The two men may also have discussed the possibility of obtaining a lawyer for Peach, but the court found that this discussion, if it occurred, was never communicated to the police. Two detectives then reentered the room, and, in Perry's presence again read the *Miranda* warnings. Peach then gave a disjointed oral statement of his activities on December 29, 1977, including the killing of Ruby Gutierrez. Following this statement, he agreed to go with the police to the Anderson home to reenact the crime. He also took the police to the place where he had thrown the murder weapon into the canal. Perry was not permitted to come along on this trip. After returning to the police station, Peach dictated a confession to a police stenographer, read the typed statement twice, and signed it. The confession states in the first paragraph, "I understand my rights. I do not want a lawyer present at this time." Government Exh. 18.

Peach had his initial appearance before the magistrate on the murder charge the next day, January 8. He did not request an attorney and none was appointed for him. At the continuation of this hearing on January 12, 1978, the public defender was appointed to represent Peach at the request of the United States Attorney when Peach said he was unable to retain his own counsel because he was paying off outstanding bills.

An information was filed against Peach on February 3, 1978. Following a jury trial, he was found guilty and sentenced to life imprisonment. His sole claim on this appeal is that the district court erred in failing to suppress his confession.

II

[*1, 2*] Peach does not contend that he was denied any rights due him under *Miranda v. Arizona*. Rather, he argues that he had a sixth amendment right to counsel under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and that he never waived that right in the manner required by *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). We agree that Peach had a right to the assistance of counsel beginning at least with his first appearance before the magistrate on January 7, but we think that the district court's finding that he waived that right must be upheld.

There can be no doubt that Peach understood his right to retain counsel or have counsel appointed for him. He had an eleventh grade education, and he was given *Miranda* warnings seven times before he confessed to the police. On the one occasion that he said he did not completely understand his rights they were explained to him in detail. He never once indicated to the authorities a desire to exercise his right to counsel. The court below and the parties to this appeal agree that the January 7 hearing is critical in this regard. At that time he was advised of his right to have an attorney for the fifth time, and the question whether he could afford to retain one was raised. Peach did not assert that he was indigent and did not request that counsel be appointed to represent him. If he intended at that time to retain his own counsel, the police did everything they can reasonably be expected to have done to facilitate that end. Peach was given a list of attorneys to contact and given access to a phone, but he made no effort to call any of them.

The written statement that was introduced at trial plainly states, "I do not want a lawyer present at this time."

The testimony indicates that these were not Peach's words; they are part of a standard government introduction to confessions. Nevertheless, Peach carefully read the statement twice before signing it and testified that he understood at the time that he was giving up his right to have an attorney present. Record, vol. 3, at 101. This is not a case like *Brewer v. Williams* where the police were aware that the defendant was represented by counsel and deliberately set out to get a confession before he could consult his attorney. Peach's actions and words, as disclosed by this record, fully support the district court's finding of waiver.

III

[3] The second argument on this appeal is that the federal magistrate violated Fed.R.Crim.P. 44 when he failed to appoint counsel for Peach at the January 7 hearing. Rule 44(a) states: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment." The Advisory Committee notes to the rule state that it is "intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel." 18 U.S.C. Federal Rules of Criminal Procedure App. at 1471 (1976). As we have stated, at the hearing Peach was advised for the fifth time of his right to retain counsel or to have an attorney appointed to represent him if he could not afford to obtain one himself. The magistrate conducted an inquiry regarding whether Peach could afford a lawyer. The evidence clearly preponderates in favor of the view that Peach failed to give any indication to the magistrate either that he could not afford an attorney or that he wanted one appointed. Under these circumstances, we do not think the rule required that anything more be done. At no time during this hearing did it "appear[] that the defendant [was] unable to obtain counsel." *Id.* What we said in *De La Fe v. United States,* 413 F.2d 543, 544 (5th Cir. 1969),

accurately describes our view of the rule: "The burden of furnishing an attorney only attaches upon representation of an individual that he is indigent and that he wishes an attorney."[1] *Cf. United States v. Williams,* 544 F.2d 1215, 1218-19 (4th Cir. 1976) (waiver of statutory right to two counsel in capital case presumed absent request or clear necessity for additional counsel).

Peach cites *Carnley v. Cochran,* 369 U.S. 506, 513, 82 S.Ct. 884, 889, 8 L.Ed.2d 70 (1962), for the proposition that the right to be furnished counsel does not depend on a request. In *Carnley,* the defendant was never advised of his right to counsel, and the Supreme Court refused to imply waived from a silent record. The record here is not silent. Peach was repeatedly advised of his rights, and we have already held that he waived his sixth amendment right to counsel before confessing. Under rule 44, once a defendant is advised of his right to have counsel appointed and an inquiry is made as to his ability to retain counsel, it is incumbent on the defendant to give some indication that he wants an attorney appointed for him. The authorities are not required to read his mind or discern that, although he says he will obtain an attorney, he really cannot afford one and should have appointed counsel. This is not a case where a defendant was required to plead or go to trial without the assistance of counsel. As soon as Peach indicated he could not afford an attorney, the magistrate appointed the public defender. The conviction is

AFFIRMED.

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1. We do not suggest that indigency is the sole ground for appointing counsel. "If a defendant is able to compensate counsel but still cannot obtain counsel, he is entitled to the assignment of counsel even though not to free counsel." Advisory Comm. Notes to Rule 44(a), *supra.* Peach gave no indication that he was unable to obtain counsel to represent him.